Congress of the United States
Washington, DC 20515

June 25, 2019

The Honorable R. Alexander Acosta
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: RIN 1235-AA26: Joint Employer Status Under the Fair Labor Standards Act

Dear Secretary Acosta:

We write in response to the Department of Labor ("Department") proposed regulation establishing factors to determine joint employer status pursuant to the *Fair Labor Standards Act* ("FLSA" or "Act").[1] We support the Department's proposed rule, which provides American workers and businesses with a commonsense, clear standard to determine joint employer status.

The Act requires employers to pay their employees wages for hours worked. Furthermore, the Act recognizes that along with an employer, additional individuals or entities may be jointly responsible for an employee's wages.

The Department has not significantly altered its joint employer regulation since 1958. The existing regulation states that multiple individuals or entities may be joint employers of an employee if the "employment by one employer is *not completely disassociated* from employment by the other employer(s)."[2] Notably, this existing regulation provides workers and businesses with little explanation as to what constitutes "not completely disassociated" when an employee's work for their employer simultaneously benefits another individual or entity.

The Senate Committee on Health, Education, Labor and Pensions ("Senate Committee") has long been concerned with the potential consequences of an expansive joint employer standard. In September 2015, Chairman Alexander introduced the *Protecting Local Business Opportunity Act*, which would have corrected the National Labor Relations Board's ("NLRB" or "Board") 2015 misguided ruling in *Browning-Ferris Industries of California, Inc.* ("*BFI*").[3] This bill sought to reinstitute the Board's long-standing joint employer standard that two or more entities

[1] *See* Joint Employer Status under the Fair Labor Standards Act, 84 Fed. Reg. 14,043 (proposed Apr. 9, 2019) (to be codified at 29 C.F.R. pt. 791) [hereinafter *Joint Employer Rulemaking*].
[2] 29 C.F.R. § 791.2(a) (2018) (emphasis added).
[3] *See* Protecting Local Business Opportunity Act, S. 2015, 114th Cong. (2015).

may be joint employers only if each entity shares and exercises actual, direct, and immediate control over employees' essential employment terms and conditions.[4] The Senate Committee held two hearings on the Board's joint employer activities.[5] Most recently, on January 17, 2019, Chairman Alexander led eight other Senators in submitting a comment letter in broad support of the Board's proposed joint employer standard.

The House Committee on Education and the Workforce ("House Committee") thoroughly examined the joint employer issue and favorably reported legislation to invalidate the radical *BFI* joint employer standard issued by the Obama NLRB in 2015. During the 113th, 114th, and 115th Congresses, the House Committee held nine hearings examining the joint employer standard under the *National Labor Relations Act* (NLRA) and FLSA.[6] The House Committee received testimony from a variety of stakeholders, including 10 small business owners, stressing the need to protect the independence of all businesses, and in particular subcontractors and franchisees. Significantly, testimony presented at these hearings spoke of the importance of legislative and regulatory actions to reign in unreasonable and unworkable joint employer standards.

In response to the issues raised in these public hearings, the House Committee passed legislation clarifying the joint employer standard in both the 114th and 115th Congresses. On October 28, 2015, the House Committee favorably reported H.R. 3459, the *Protecting Local Business Opportunity Act*,[7] to the House of Representatives. H.R. 3459 amended the NLRA to restore the long-held standard that two or more employers can only be considered joint employers if each share and exercise control over essential terms and conditions of employment, and the control is actual, direct, and immediate. On July 27, 2017, Rep. Bradley Byrne (R-AL), then-chairman of the House Committee's Subcommittee on Workforce Protections, introduced H.R. 3441, the *Save Local Business Act*.[8] H.R. 3441 amended the NLRA and FLSA to clarify that two or more employers can only be considered joint employers if each share and exercise actual, direct, and immediate control over essential terms and conditions of employment. On October 4, 2017, the House Committee favorably reported H.R. 3441 to the House of Representatives, and the House passed the bill on November 7, 2017, by a vote of 242-181.

Additionally, on December 21, 2018, then-House Committee Chairwoman Virginia Foxx (R-NC) and then-House Committee Subcommittee on Health, Employment, Labor, and Pensions Chairman Tim Walberg (R-MI) submitted a comment letter to the NLRB supporting the Board's proposed joint employer rule as restoring a reasonable and appropriate interpretation of the NLRA and creating greater clarity and opportunity for entrepreneurs and workers. House Committee Ranking Member Foxx also submitted a supplemental comment to the Board on January 28, 2019, supporting the Board's authority to promulgate a joint employer rule and urging the Board to complete the process expeditiously.

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[4] *Id.*
[5] *See Stealing the American Dream of Business Ownership: The NLRB's Joint Employer Decision, Hearing Before the S. Comm. on Health, Education, Labor and Pensions*, 114th Cong. 17 (2015); *see Who's The Boss? The "Joint Employer" Standard and Business Ownership, Hearing Before the S. Comm. on Health, Education, Labor and Pensions*, 114th Cong. 12 (2015).
[6] *See* H.R. Rep. No. 115-379, at 2-5 (2017).
[7] H.R. 3459, 114th Cong. (2015).
[8] H.R. 3441, 115th Cong. (2017).

The Proposed Rule Provides a Clear, Commonsense Standard

The Department's proposed rule concerns the common scenario in which an employee's work for their employer simultaneously benefits another individual or entity. The proposed rule eliminates the "not completely disassociated" standard and clarifies that "[t]he other person is the employee's joint employer only if that person is acting directly or indirectly in the interest of the employer in relation to the employee."[9] The proposed rule articulates a four-factor balancing test examining whether the other individual or entity (i) hires or fires the employee; (ii) supervises or controls the employee's work schedule or conditions of employment; (iii) determines the employee's rate and method of payment; and (iv) maintains the employee's employment records.[10]

We agree with the Department that workers and businesses deserve and would benefit from additional direction on how to determine joint employer status under the FLSA. It is particularly troubling that some may interpret the existing "not completely disassociated" standard to mean that a joint employer relationship always exists when an employee's work for their employer simultaneously benefits another individual or entity.

The Department's proposed rule provides clarity by articulating a practical four-factor test that will yield a more nuanced joint employer analysis. The proposed rule prudently mirrors the joint employer test found in *Bonnette v. California Health & Welfare Agency*,[11] which is used by the U.S. Courts of Appeals for the First and Fifth Circuits. The *Bonnette* factors examine whether the purported employer (i) had the power to hire and fire the employee(s); (ii) supervised and controlled employee work schedules or conditions of employment; (iii) determined the rate and method of payment; and (iv) maintained employment records.[12]

Notably, the proposed rule ensures the regulation is fully consistent with the FLSA's text, which states that an employer (and by extension any joint employer(s)) is determined based on the individual or entity's "*acting* . . . in relation to an employee"[13] in two ways. First, the proposed rule rightly adjusts the first *Bonnette* factor by eliminating the focus on whether the alleged joint employer possessed the power to hire and fire, placing the inquiry on whether the potential joint employer affirmatively hires or fires the employee. Second, the proposed rule clarifies that a person or entity's mere reserved right, ability, or power to act with respect to an employee is immaterial to a joint employer inquiry.[14]

Moreover, the proposed rule provides clear direction after federal circuit courts have adopted a "dizzying world of multi-factor tests."[15] This patchwork of standards makes it exceptionally difficult for businesses operating in more than one jurisdiction to predict joint employer status accurately. The Department's proposed rule would provide courts, workers, and businesses with a much-needed practical joint employer framework, resulting in less joint employer litigation.

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[9] *Joint Employer Rulemaking*, *supra* note 1, at 14,059.
[10] *Joint Employer Rulemaking*, *supra* note 1, at 14,059.
[11] 704 F.2d 1465 (9th Cir. 1983), *abrogated on other grounds*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).
[12] *Id.* at 1470.
[13] *Joint Employer Rulemaking*, *supra* note 1, at 14,059 (emphasis added).
[14] *Joint Employer Rulemaking*, *supra* note 1, at 14,059.
[15] Harris v. Medical Transp. Mgmt., 300 F. Supp. 3d 234, 241 (D.D.C. 2018), 2018 U.S. Dist. LEXIS 35709, *14, 2018 WL 1178025.

The Proposed Rule is a Catalyst for Continued American Opportunity

The Department's rule is good news for everyone who wants to realize the American dream of owning a small business. In particular, many owners of the country's 733,000 franchise businesses took the chance to partner with established franchise companies that offer the necessary tools to create a successful business. At a 2015 Senate Committee hearing on joint employment, a franchise owner discussed his family's decision to start their business:

> My wife and I quit our secure jobs and poured our life savings into this business. We made this move so that our three young daughters . . . could grow up close to their grandparents and the rest of our extended family . . . . [We] decided that a franchise opportunity would be the best fit for our family because it would allow me to be an independent business owner but still be able to work with a proven brand and business model.[16]

Businesses of all sizes and types, and particularly franchise businesses, found themselves under attack by the previous administration's expansive joint employer standards. These broad standards mean that companies find it much more practical to own and operate all of their own restaurants, day care centers, and cleaning businesses themselves, resulting in fewer franchisee-owned small businesses.

Whether a person or entity is a joint employer under the Act depends on all of the relevant facts.[17] In light of this basic principle, we support the proposed rule clarifying that a potential joint employer's particular business model, such as franchising, does not make joint employer status more or less likely under the Act.[18] This essential clarification ensures that American franchise owners and other entrepreneurs are not unfairly targeted by instead rightly focusing joint employer inquiries on affirmative conduct.

The Proposed Rule Promotes Safe and Informed Workplaces

Lastly, federal law should encourage contract provisions that foster safe and informed workplaces. We support the proposed rule explaining that particular contract provisions between an employer and another individual or entity do not make joint employer status more or less likely.[19] In particular, the mere existence of the following provisions are not probative of joint employer status: "requiring the employer to institute workplace safety practices, a wage floor, sexual harassment policies, morality clauses, or other measures to encourage compliance with the law or to promote desired business practices."[20] In the absence of this clarification, employers, individuals, and entities will not agree to reasonable contract provisions thanks to the uncertainty surrounding whether good-faith agreements could be grounds for establishing unwanted joint employer relationships.

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[16] *Who's The Boss? The "Joint Employer" Standard and Business Ownership, Hearing Before the S. Comm. on Health, Education, Labor and Pensions*, 114th Cong. 15 (2015) (statement of John Sims IV, Franchise Owner, Rainbow Station).
[17] *Joint Employer Rulemaking*, *supra* note 1, at 14,059.
[18] *Joint Employer Rulemaking*, *supra* note 1, at 14,059.
[19] *Joint Employer Rulemaking*, *supra* note 1, at 14,051.
[20] *Joint Employer Rulemaking*, *supra* note 1, at 14,051.

We strongly support the proposed rule and appreciate your attention to our views and comments.

Sincerely,

Virginia Foxx
Ranking Member
U.S. House of Representatives Committee
on Education and Labor

Lamar Alexander
Chairman
U.S. Senate Committee on Health,
Education, Labor and Pensions

Bradley Byrne
Ranking Member
Subcommittee on Workforce Protections
U.S. House of Representatives Committee
on Education and Labor

Johnny Isakson
Chairman
Subcommittee on Employment and
Workplace Safety
U.S. Senate Committee on Health,
Education, Labor and Pensions